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CLERK

IN THE
Supreme Court of the United States
October Term, 1997

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; and
MARTHA FLETCHER,

Petitioners,

against

CROW TRIBE OF INDIANS; and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF AMICI CURIAE STATES OF NEW YORK, ALABAMA,
ALASKA, ARIZONA, CALIFORNIA, FLORIDA, HAWAII,
IDAHO, IOWA, MICHIGAN, MINNESOTA, MISSOURI,
NEBRASKA, NEVADA, NORTH DAKOTA, SOUTH DAKOTA,
UTAH, VERMONT, VIRGINIA, WASHINGTON AND WYOMING
IN SUPPORT OF PETITIONERS**

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Table of Contents

Interest of <i>Amici Curiae</i>	1
Summary of the Argument	2
ARGUMENT	
POINT I	
The Judgment awards relief where elements of an assumpsit action for money had and received are missing and, hence, is contrary to <i>California</i>	3
POINT II	
Federal equity practice prohibits federal court interference in state taxation systems.	6
Conclusion	9

Table of Authorities

<u>Cases</u>	<u>Page</u>
<i>City of Philadelphia v. The Collector,</i> 5 Wall. 720 (1867)	5
<i>Crow Tribe of Indians, et al. v. State of Montana, et al.,</i> 92 F.3d 826 (1996)	passim
<i>Davis v. Michigan Dept. of Treasury,</i> 489 U.S. 803 (1989)	2
<i>Fair Assessment in Real Estate Ass'n v. McNary,</i> 454 U.S. 100 (1981)	3, 7
<i>Great Lakes Co. v. Huffman</i> , 319 U.S. 293 (1943)	7
<i>Matthews v. Rodgers</i> , 284 U.S. 521 (1932)	3, 7
<i>McKesson Corp. v. Florida Div. of Alcoholic Beverages and Tobacco</i> , 496 U.S. 18 (1990)	2
<i>Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation</i> , 425 U.S. 463 (1976)	7
<i>National Private Truck Council, Inc., et al. v. Oklahoma Tax Comm'n</i> , 515 U.S. 582 (1995)	3, 8
<i>Singer Sewing Machine Co. v. Benedict</i> , 229 U.S. 481 (1913)	3
<i>Tully v. Griffin, Inc.</i> , 429 U.S. 68 (1976)	7

<u>Cases - Continued</u>	<u>Page</u>
<i>United States v. California</i> , 507 U.S. 746 (1993)	passim
<i>United States v. New Mexico</i> , 455 U.S. 720 (1982)	5
 <u>Federal Statutes:</u>	
<i>Tax Injunction Act</i> , 28 U.S.C. § 1341	7, 8
<i>42 U.S.C. § 1983</i>	3, 8

Interest of Amici Curiae

The States of New York, Alabama, Alaska, Arizona, California, Florida, Hawaii, Idaho, Iowa, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Dakota, South Dakota, Utah, Vermont, Virginia, Washington and Wyoming file this brief as amici curiae in support of petitioners and urge the reversal of the Judgment and Order of the Ninth Circuit Court of Appeals in *Crow Tribe of Indians, et al. v. State of Montana, et al.*, 92 F.3d 826 (1996) (the "Judgment"). The ability to tax is a function critical to States' sovereignty and the States have a vital interest in their ability to have consistent, effective and assured tax collection and protest programs. The Ninth Circuit's ruling invades that interest. It permits the avoidance of state administrative and judicial remedies, thereby infringing upon the States' taxation processes. It allows a non-taxpayer to challenge another's tax liability, thereby exponentially expanding the number and scope of available tax challenges. It allows the litigation of settled issues, thereby encouraging multiplicitous litigation and rendering state settlements and judgments subject to collateral attack. It creates an amorphous, standardless, retrospective equitable theory of recovery, thereby rendering the outcome of litigation unpredictable, and creating the potential for devastating impacts on the States' fiscal planning processes.

The holding of the Ninth Circuit therefore puts state tax assessment collection systems at risk, and potentially creates vast retroactive exposure to tax reimbursements to an extent which threatens fiscal planning processes. In short, the Judgment is a direct affront to state sovereignty and fiscal integrity.

Summary of the Argument

The power to tax is at the core of state sovereignty. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989); *McKesson Corp. v. Florida Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). Inherent in the power to tax must be the power to mandate procedures, consistent with constitutional restraints, both for imposing and for protesting such taxes.

In *United States v. California*, 507 U.S. 746 (1993) ("California"), a case whose facts are closely aligned with those here, this Court rejected a claim asserted by the federal government in assumpsit for money had and received regarding state taxes imposed upon a federal contractor. This Court ruled that privity was lacking between the federal government and the State of California and that no implied contract between them was created. Consequently, an assumpsit action for money had and received will not lie. This Court explicitly noted that the theory of recovery was unavailable even though the federal government would experience a financial impact resulting from its obligation to reimburse taxes to the contractor.

As discussed more fully *infra*, the facts of *California* parallel those presented in the case at bar. In light of these similarities, we submit, the result should have been the same and the Ninth Circuit's Judgment should be reversed.

The Ninth Circuit's ruling also is contrary to established principles of federal equity practice, comity and the doctrine of federal court abstention. Numerous cases explicitly recognize that federal courts must exercise restraint from interfering with

state taxation programs where a State provides an adequate protest procedure to contest its tax liabilities. *Matthews v. Rodgers*; 284 U.S. 521, 526 (1932) (prohibiting invoking a federal court's equity powers in the context of state tax disputes); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481 (1913) (prohibiting use of general equity powers in the context of state tax disputes); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (deferring to state tax procedures on principles of comity); *National Private Truck Council, Inc., et al. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) (federal equity principles bar declaratory and injunctive relief under 42 U.S.C. § 1983 in state court actions challenging a state tax under the Commerce Clause where an adequate legal remedy exists).

Thus, the Judgment should be reversed because it is contrary to *California* and violates principles of federal equity practice, comity and judicial restraint.

ARGUMENT

Point I

The Judgment awards relief where elements of an assumpsit action for money had and received are missing and, hence, is contrary to *California*.

California presented a set of facts substantially similar to those involved here. There, the State of California had issued sales and use tax deficiency notices to a federal contractor. The contractor, using funds advanced by the federal government, paid the taxes under protest and commenced a refund action in

state court. Ultimately, California and the contractor settled the case, and the state court action was dismissed. *United States v. California*, 507 U.S. at 749.

Subsequently, the federal government, despite the existence of state protest procedures, sued California in federal court for a declaratory judgment and a refund on the theory that as a federal contractor, the contractor was exempt from state taxation. The federal government contended that its indemnification obligations pursuant to contract made it the real party in interest entitled to maintain an assumpsit action for money had and received in federal court, notwithstanding that the tax actually had been imposed on the contractor and notwithstanding that the contractor had settled its tax dispute with the State. This Court rejected those claims.

This case presents a substantially similar set of facts and claims. In both cases, a state tax was imposed not upon an entity immune from taxation but on another: in *California*, on the contractor; in this case, on the mineral lessee. In both cases, the actual taxpayer paid the tax in accordance with state law. In both cases, the actual taxpayer was unable to pursue additional remedies in state court: in *California* because of a settlement with state taxing authorities after protest (507 U.S. 746) and in this case, because of the mineral lessee's failure to meet state mandated protest procedures (92 F.3d 826). In both cases, an immune non-taxpayer claimed a negative economic effect: in *California*, on the federal government directly through its contractual obligation to reimburse the contractor for state imposed taxes; in this case, on the Crow Tribe indirectly through the claimed possibility that it might have been able to extract higher royalty payments from the mineral lessee were it not for the tax. In both cases, the immune non-taxpayer commenced an assumpsit action for money had and received in

United States District Court challenging the imposition of state taxes on the state taxpayer on the theory that their relationships with the taxpayer created an identity of interest. Thus, the facts and claims involved in the two cases are extremely similar.

In *California*, this Court reaffirmed that an assumpsit action for money had and received may be pursued only in the absence of state remedies for the recovery of taxes erroneously or illegally extracted. *United States v. California*, 507 U.S. at 751, citing *City of Philadelphia v. The Collector*, 5 Wall. 720 (1867). Equally importantly, this Court implicitly ruled that the traditional elements of an assumpsit action for money had and received must be present for a petitioner to be entitled to relief.

A unanimous Court in *California* found on the facts presented that the elements of an assumpsit action for money had and received were lacking and rejected the federal government's claim. Specifically, this Court found that the relationships between the federal government, its contractor and the State were insufficient to imply in law a contractual relationship between the federal government and the State. Such a relationship, this Court held, is an indispensable element of an assumpsit action for money had and received. *United States v. California*, 507 U.S. at 750-751.

Going further, this Court explicitly held that an adverse economic consequence upon the immune entity standing alone does not infringe upon state sovereignty. *Id.*, at 759-760 ("Today we hold that shouldering the 'entire economic burden of the levy,' *Id.*, at 734 [*United States v. New Mexico*, 455 U.S. 720 (1982)], through indemnification does not give the federal Government a federal common-law cause of action for money had and received to challenge a state tax on State-law grounds simply because it is the Government.")

Applying the *California* principles to the facts presented here, the Ninth Circuit should have rejected the Crow Tribe's claim. The court awarded relief notwithstanding an explicit acknowledgment that elements of an *assumpsit* action for money had and received were missing ("However, we held in *Crow III* that the Tribe stated a claim for equitable relief despite the absence of traditional requirements for relief under theories of *assumpsit* or constructive trust...." 92 F.3d at 828). In doing so, the Ninth Circuit's ruling contradicts this Court's holding in *California*, which does require that the elements of an *assumpsit* action for money had and received be met to warrant awarding relief under that theory. Thus, whereas in *California* this Court denied relief specifically because the traditional elements of an *assumpsit* action for money had and received were missing, the Ninth Circuit granted relief notwithstanding that those same elements were missing.

The conclusion therefore is inescapable that the Ninth Circuit here either ignored *California* or else crafted a new, heretofore unknown equitable cause of action not requiring those elements. To the extent that the Judgment is contrary to *California*, it should be reversed for that reason alone. To the extent that it purports to create some new equitable cause of action, it should be reversed for the reasons which follow.

Point II

Federal equity practice prohibits federal court interference in state taxation systems.

This Court has long recognized the principle, alternately described as a principle of federal equity practice, a principle of comity, or a doctrine of federal court abstention, that where a

State provides adequate procedures for relief from inappropriate tax assessments, the federal courts will refrain from interfering with those procedures. *Fair Assessment in Real Estate Ass'n v. McNary, supra*; *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976); *Great Lakes Co. v. Huffman*, 319 U.S. 293, 298 (1943). If the decision below is construed to create a new equitable theory of recovery outside of the context of an *assumpsit* action for money had and received, then the Ninth Circuit has acted contrary to these principles of restraint.

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976), is especially relevant to this case because it addresses not only the statutory prohibition of the Tax Injunction Act but principles of federal equity practice as well. Quoting from *Great Lakes Co. v. Huffman, supra*, at 298, which itself quoted from *Matthews v. Rodgers*, 284 U.S. 521, 525-526 (1932), this Court observed: "the mere illegality or unconstitutionality of a state . . . tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved." 425 U.S. at 470.

Similarly, *Great Lakes Co. v. Huffman, supra*, recognizes that federal courts should refrain from exercising their equity powers to displace adequate state taxation protest procedures. This Court, quoting from *Matthews v. Rodgers, supra*, at 525, stated in part: "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Great Lakes Co. v. Huffman*, 319 U.S. at 298.

To the extent that the Ninth Circuit decision might be read to create a new federal right available to non-taxpayers to challenge another's tax liability, it is inconsistent with this Court's ruling in *National Private Truck Council, Inc., et al. v. Oklahoma Tax Comm'n, supra*. In that case, this Court recognized "the strong background presumption against interference with state taxation," which is voiced in a statute such as the Tax Injunction Act (28 U.S.C. § 1341), as a "principle of federalism." 515 U.S. at 590. Thus, this Court held that 42 U.S.C. § 1983 does not call for federal or state courts to award injunctive or declaratory relief when an adequate legal remedy exists under state law. *Id.*, at 590-91. As this Court noted in *National Private Truck Council, Inc.*, "[w]hether a suit is brought in federal or state court, Congress simply did not authorize the disruption of state tax administration in this way." *Id.*, at 590. A federal common law right would be subject to this same basic principle of federalism.

Thus, if indeed the Ninth Circuit has created a new theory of recovery, it has done so by invading principles of restraint which federal courts have followed until now. For that reason, the Judgment should be reversed.

CONCLUSION

The Judgment should be reversed.

Respectfully Submitted,

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